Supreme Court, U.S.
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No. 05-181

In The

Supreme Court of the United States

WILLIAM CONEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err when it applied a deferential standard of review to the district court's determination that the government's tendered explanation for a delay in sealing a wiretap tape was "satisfactory" within the meaning of 18 U.S.C. § 2518(8)(a)?

2. Should the Court of Appeals have applied *de novo* review to the district court's determination that the government's tendered explanation for a delay in sealing a wiretap tape was "satisfactory" within the meaning of 18 U.S.C. § 2518(8)(a) as the Second, Eighth, Ninth and Tenth Circuits have done?

3. Can negligent, unjustifiable actions be the basis for a "satisfactory explanation" under 18 U.S.C. § 2518(8)(a), so long as the explanation dispels any reasonable suspicion of tampering?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below.

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OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals (the "Court of Appeals") is reported at 407 F.3d 871. The decision is reprinted in the attached appendix (App. 1-7).

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 2005. This petition is filed within 90 days of that date. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pursuant to the Court's Rule 14.1(f), 18 U.S.C. § 2518(8)(a) is set out verbatim:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for

use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT OF THE CASE

William Coney ("Coney") was convicted by a jury on federal drug charges. At trial, the government presented records of telephone calls intercepted under the federal wiretap statute, 18 U.S.C. § 2510. For the government to use the intercept tapes, the tapes must have been immediately sealed upon expiration of the order by the judge who issued the order for the wiretap. If the tapes were not immediately sealed, the government must establish a "satisfactory explanation" for the delay. 18 U.S.C. § 2518(8)(a) (1998).

There were two intercept orders. The tapes obtained pursuant to the first order were timely sealed. The second intercept order, granted on September 10, 1997, expired on October 10, 1997. The government did not present tapes obtained from the second intercept order to the judge for sealing until October 20, 1997, ten days after the order expired.

At trial, Coney filed a motion to suppress the second set of intercept tapes under 18 U.S.C. § 2518(8)(a). The government opposed the motion and presented, as the only evidence, the uncontested affidavits of Assistant United

States Attorneys Jacqueline Ross ("Ross") and Kaarina Salovaara ("Salovaara"). In her affidavit, Ross stated:

> From on or about September 30, 1997 through October 16, 1997, I was out of the office on a previously scheduled vacation. Prior to my departure, I had arranged with my supervisor AUSA Mark Prosperi, my partner on the case, Kaarina Salovaara and the Case Agent, FBI Special Agent Randall MacIntosh, for them to handle any and all issues relating to the Jackson investigation and the previously mentioned September 10, 1997 Interception Order. App. 12.

In her affidavit, Salovaara stated:

> The interception order obtained by Ms. Ross expired on Friday, October 10, 1997. The following Monday, October 13, 1997, was a federal holiday and the federal courts were closed. For reasons I am unable to reconstruct, the government did not move to seal the tapes with Chief Judge Aspen for an additional three days, until Friday, October 17, 1997. It is possible, but I am not certain, that I understood that Ms. Ross was returning to the office early in the week of October 13. As set forth in her affidavit, on Friday, October 17, Ms. Ross prepared the sealing application and draft order and the application was dated Friday, October 17, 1997. However she was unable to file the application and draft order that day, and they ultimately were filed with Chief Judge Aspen on Monday, October 20, 1997. App. 15.

The district court judge denied the motion to suppress, finding the government's tendered explanation for the ten day delay in sealing the tapes satisfactory. The court ruled that "[t]he explanation is *essentially* that Ross

did not communicate the necessity for a sealing to Salovaara. . . . I find the explanation satisfactory here." App. 10-11 (emphasis added). Coney appealed the court's ruling to the Seventh Circuit Court of Appeals. After stating the facts of the case, the Seventh Circuit discussed the appropriate standard of review. The Seventh Circuit stated that there was a two to one circuit split in favor of *de novo* review on the standard of review for whether the government's explanation for a delay in sealing the tapes was "satisfactory." The Court of Appeals sided with the minority position and held that deferential review was the correct standard of review when determining whether the government's explanation for the delay was "satisfactory" under 18 U.S.C. § 2518(8)(a). The Court of Appeals then stated that satisfactoriness under 18 U.S.C. § 2518(8)(a) was "a factual rather than a legal determination" and deference to the trial judge was therefore in order. App. 3-4.

Applying this deferential standard of review, the Court of Appeals, relying solely on the affidavits of Ross and Salovaara and the District Court's denial of Coney's motion to suppress, held the government's explanation of the delay in sealing the tapes to be "satisfactory." The Court of Appeals held that "an explanation is satisfactory if, in the circumstances, it dispels any reasonable suspicion of tampering." The court then concluded: "the explanation offered for the lapse was satisfactory. . . . There was neglect, but it was harmless and therefore, while it was not justifiable, it was excusable." App. 5-7.

Pursuant to the Court's Rule 14.1(g)(ii), the United States District Court for the Northern District of Illinois, Eastern Division had jurisdiction pursuant to 18 U.S.C.

§ 3231, which provides original jurisdiction for all offenses against the laws of the United States.

REASONS FOR GRANTING THE WRIT

1. Pursuant to Supreme Court Rule 10(a), a compelling reason exists for granting the requested writ because there is a split amongst the United States Courts of Appeals on an important matter. *See, e.g., Miller v. Fenton,* 474 U.S. 104, 109 (1985) ("Because the Courts of Appeals have reached differing conclusions on whether state-court voluntariness determinations are entitled to . . . presumptions of correctness . . . we granted certiorari."); *Ornelas v. United States,* 517 U.S. 690, 695 (1996) ("We granted certiorari to resolve the conflict among the Circuits over the applicable standard of appellate review."); *Buford v. United States,* 532 U.S. 59, 62 (2001) ("In light of the different circuits' different approaches to the problem, we granted the writ.").

The Court of Appeals' decision in *Coney,* adopting a deferential standard of appellate review on whether the government's tendered explanation is "satisfactory" under 18 U.S.C. § 2518(8)(a) is in direct conflict with the standard adopted in four circuits. The Courts of Appeals for the Second, Eighth, Ninth and Tenth Circuits have held the issue of whether an explanation is "satisfactory" to be a question of law, and therefore apply *de novo* review to the district courts' rulings. *United States v. Cline*, 349 F.3d 1276, 1284 (10th Cir. 2003); *United States v. Pederoni*, 958 F.2d 262, 265 (9th Cir. 1992); *United States v. Sawyers*, 963 F.2d 157, 159 (8th Cir. 1992); *United States v. Maldonado-Rivera*, 922 F.2d 934, 950 (2d Cir. 1990) (*citing United States v. Rodriguez*, 786 F.2d 472, 476 (2d Cir.

1986) ("This question is not a matter of basic or historical fact but rather is a question of the interpretation of the statute. . . . The district court's rulings on such questions are subject to a full review on appeal")).

In direct conflict with the Second, Eighth, Ninth and Tenth Circuits, the Courts of Appeals for the Sixth and Seventh Circuits hold the issue of whether an explanation is "satisfactory" to be a question of fact and therefore apply deferential review to the district courts' rulings. App. 4 (holding whether the government's explanation is "satisfactory" is a "factual rather than a legal determination"); *United States v. Wilkinson*, 53 F.3d 757, 760 (6th Cir. 1995).

Furthermore, the standard of review concerning the satisfactoriness of the government's explanation for a delay in sealing the wiretap is an important matter. This Court has, in the past, granted certiorari to resolve a circuit split over the standard of review on a "legal question [that] is a minor, detailed, interstitial question of sentencing law, buried in judicial interpretation of an application note to a Sentencing Guideline." *Buford*, 532 U.S. at 65. On the other hand, the issues raised in this case are "importan[t] to the administration of criminal justice" and therefore must be addressed by this Court. *Miller v. Fenton*, 474 U.S. 104, 109 (1985). In *Fenton*, this Court granted certiorari to resolve a circuit split over the appropriate appellate standard of review for whether a confession was "voluntary," because a confession can be such powerful evidence that the issue is one of importance to the criminal justice system. *Id.* at 10-19.

Similarly, a wiretap tape can be powerful evidence against a criminal defendant. It is stronger than a confession, as it contains the defendant's admission and description of his possibly illegal actions and there may be reluctance to

exclude such a powerful piece of evidence. *See id.* at 117. Thus, a resolution to the question of the appropriate standard of review concerning the satisfactoriness of the government's explanation in sealing the wiretap tapes should be addressed by this Court.

2. This Court should also grant certiorari because the Court of Appeals' decision undermines this Court's prior holding in *United States v. Ojeda Rios,* 495 U.S. 257, 264-65 (1990). In *Ojeda Rios,* this Court held that "[t]o hold that proof of nontampering is a substitute for a satisfactory explanation is foreclosed by the plain words of the sealing provision." *Id.* A showing of authenticity by the government, as a satisfactory explanation for delay, would "nullify" the sealing requirement as a safeguard against tampering. *Id.* A "satisfactory explanation" is not synonymous with a showing of nontampering. *Id.* Yet, in *Coney,* the Court of Appeals held, in direct conflict with this Court's holding in *Ojeda Rios,* that "an explanation is satisfactory if . . . it dispels any reasonable suspicion of tampering." App. 6.

In addition, by holding that the government merely needs to show that the tape was not tampered with, and not that there is a satisfactory explanation for the delay, the Court of Appeals has read "satisfactory" out of the statute. This holding directly conflicts with its duty to give effect to every word in a statute. *E.g. United States v. Menasche,* 348 U.S. 528, 538-39 (1955); *Montclair v. Ramsdell,* 107 U.S. 147, 152 (1883).

CONCLUSION

The Court should grant certiorari in order to address the circuit split concerning the appropriate appellate

standard of review for determining whether the government's explanation for delay in sealing tapes under 18 U.S.C. § 2518(8)(a) is "satisfactory". This Court should also grant certiorari because the Court of Appeals' decision undermines this Court's prior holding in *Ojeda Rios* and disregards the plain meaning of the statute.

Respectfully submitted,

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM CONEY, Defendant-Appellant.

No. 02-3361

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

407 F.3d 871; 2005 U.S. App. LEXIS 8248

February 25, 2005, Argued
May 11, 2005, Decided

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff – Appellee: Nancy Miller, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

For WILLIAM CONEY, Defendant – Appellant: Bret A. Rappaport, David E. Beker, SCHWARTZ, COOPER, GREENBERGER & KRAUSS, Chicago, IL USA.

JUDGES: Before BAUER, POSNER, and RIPPLE, Circuit Judges.

OPINION BY: POSNER

OPINION:

POSNER, *Circuit Judge*. The defendant was convicted by a jury of federal drug offenses and sentenced to 240 months in prison. The evidence that the government presented at trial included recordings of telephone calls intercepted pursuant to orders issued by the chief judge of the district court under Title III, the federal wiretap statute, 18 U.S.C. 2510. The contents of the intercept "shall, if possible" (it was possible here), "be recorded." 18 U.S.C. § 2518(8)(a). "Immediately upon the expiration of the period [covered by the intercept order] . . . such recordings shall be made available to the judge issuing such order and sealed under his directions. . . . The presence of

the seal . . . , or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents" of the intercept. *Id.* The purpose of these provisions is to prevent the government from editing or otherwise tampering with the recordings. *United States v. Ojeda Rios,* 495 U.S. 257, 263, 109 L. Ed. 2d 224, 110 S. Ct. 1845 (1990); *United States v. Jackson,* 207 F.3d 910, 915-18 (7th Cir.), vacated in part on other grounds, 531 U.S. 953 (2000); *United States v. Angelini,* 565 F.2d 469, 471 (7th Cir. 1977); *United States v. Gomez,* 67 F.3d 1515, 1524 (10th Cir. 1995).

There were two intercept orders. The intercepts made pursuant to the first order were duly tape recorded and the tapes were immediately submitted to and sealed by the chief judge. Their admissibility is not questioned. The question is the admissibility of the tapes made pursuant to the second intercept order (which was actually an extension of the first, but nothing turns on that detail).

The second order expired on October 10, 1997, but the tapes made pursuant to it were not submitted to the chief judge and sealed until the 20th. The government points out that only five days in this ten-day period were business days, but that is irrelevant, since the prosecutors have access to their offices even when the building in which their offices are located is closed. During the ten days, the tapes were sitting in an evidence bag, readily accessible to anyone in the office in which the bag was stored. The bag was closed, but it was not locked or sealed, or in a safe or, so far as appears, in any other locked container. Because such tapes are accessible on weekends and holidays by the very agents who might have the inclination and ability to tamper with them, it seems to us – we cannot find a case that discusses the issue – that the

relevant period for assessing whether the statute's requirement of "immediate" sealing was violated is the full ten days, as assumed in *United States v. Cline*, 349 F.3d 1276, 1283-84 (10th Cir. 2003), and *United States v. McGuire*, 307 F.3d 1192, 1202-03 (9th Cir. 2002).

Ten days is too long to be thought "immediate." "The term 'immediately' means that the tapes should be sealed either as soon as practical after the surveillance ends or as soon as practical after the final extension order expires." *United States v. Williams*, 124 F.3d 411, 429 (3d Cir. 1997). That shouldn't require more than a couple of days at most. *United States v. Wilkinson*, 53 F.3d 757, 759-60 (6th Cir. 1995); *United States v. Wong*, 40 F.3d 1347, 1375 (2d Cir. 1994); *United States v. Pedroni*, 958 F.2d 262, 265 (9th Cir. 1992). So the second set of tapes was admissible only if the government had, as the district judge presiding at the defendant's trial ruled, a satisfactory explanation for the delay in submitting the tapes to the chief judge for sealing.

But is that a judgment to be made by this court de novo, that is, without according any deference to the district court's decision? Or should we defer, and therefore reverse only if we think it clear that the decision was wrong? The courts to have addressed the issue have split two to one in favor of de novo review, compare *United States v. Sawyers*, 963 F.2d 157, 159 (8th Cir. 1992), and *United States v. Maldonado-Rivera*, 922 F.2d 934, 949-50 (2d Cir. 1990), with *United States v. Wilkinson, supra*, 53 F.3d at 760, but none of the cases offers a reason for its conclusion. We side with the minority. The question what is a "satisfactory explanation" is fact-specific, as we are about to see, rather than being governable by a rule that an appellate court might lay down. The application of a broad standard such as negligence or possession, or in this

case satisfactoriness, to the specific facts of a case is usually and we think rightly treated for purposes of appellate review as a factual rather than a legal determination. *Union Planters Bank, N.A. v. Connors*, 283 F.3d 896, 899 (7th Cir. 2002) ("satisfactory"); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998) (negligence); *United States v. Wyatt*, 102 F.3d 241, 246-48 (7th Cir. 1996) (possession); *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir. 1990) (due diligence); *Harrison v. United States*, 284 F.3d 293, 297 (1st Cir. 2002) (negligence); *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir. 1992) (en banc) (possession).

Two assistant U.S. attorneys had handled the phase of the criminal investigation that involved the interceptions. One of them, Ross, was on vacation on October 10, returning on the 17th. She stated in an affidavit (below) that she had expected the other assistant U.S. attorney working on the case, Salovaara, to submit the tapes to the chief judge immediately after the expiration of the period of the intercept on October 10. Salovaara failed to do this, however, as Ross learned when she returned to work on the 17th. Ross prepared the sealing application that same day, but according to her affidavit was unable, because of scheduling problems involving either the chief district judge or the FBI's case agent, to submit the application and the tapes until the 20th, and they were sealed that day.

The possibility of a statutory violation as a result of the delay in the sealing of the tapes did not surface until almost three years later, when the defendant moved to suppress the tapes. Ross and Salovaara submitted affidavits. Neither had a clear recollection of the episode.

Each said she had thought the other would take care of the matter, though Salovaara was notably vague in her recollection. She did add that she might have believed erroneously that Ross was returning to work on the 13th rather than the 17th, but she wasn't sure.

The defendant argues that an explanation for a delay in sealing that does not establish a good reason for the delay – that instead reveals that the delay was the result of carelessness, as in this case – can never be deemed satisfactory. There are hints of such a position in some cases, *United States v. Ojeda Rios, supra,* 495 U.S. at 265; *United States v. Jackson, supra,* 207 F.3d at 916; *United States v. Quintero*, 38 F.3d 1317, 1328-30 (3d Cir. 1994), and in the insistence in all cases that to be satisfactory the explanation must be "objectively reasonable." *United States v. Ojeda Rios, supra*, 495 U.S. at 265-67; *United States v. Jackson, supra*, 207 F.3d at 916; *United States v. Williams, supra*, 124 F.3d at 429; *United States v. Wilkinson, supra*, 53 F.3d at 760; *United States v. Carson*, 969 F.2d 1480, 1487 (3d Cir. 1992). So strict a rule would, by increasing the penalty for careless delay, encourage greater care and thus better compliance with the goal of the statute, which is to minimize the likelihood of tampering with electronic evidence. But the rule would be too strict and is not compelled by the language or purpose of the statute.

The term "satisfactory explanation" is neither self-defining nor defined in the statute. As a matter of semantics it could just mean believable or it could, as the defendant argues, mean that the explanation established that the delay had been justifiable. In choosing between these possibilities we are guided by the statutory objective. We ask what should be deemed "satisfactory" in the context of

a statute aimed at preventing government tampering with electronic evidence. The answer is that an explanation is satisfactory if, in the circumstances, it dispels any reasonable suspicion of tampering. The believability of the explanation is critical, and depends in part simply on its plausibility: the more plausible, the more believable. The length of the delay is relevant as well, and also the nature of the crime, including its notoriety or the notoriety of the defendant, and thus the pressure on the government to obtain a conviction; and also the importance of the tapes to the government's case.

Suppose the sealing of the tapes had been delayed for months, the explanation offered for the delay was that the assistant U.S. attorney had accidentally dropped the tapes in a birdbath and had spent the intervening months trying to dry them out with a defective hair dryer, the defendant was the FBI's Public Enemy Number One, and the tapes were the only evidence of his guilt. The explanation would be unsatisfactory. But the present case is remote from our hypothetical case. The delay was much shorter. The mixed-signal explanation given by the assistant U.S. attorneys is plausible, and the fact that their affidavits are vague is readily accounted for by the lapse of time between the incident and the making of the affidavits, rather than being a sign of evasiveness. The case was a routine drug prosecution of a defendant of no particular notoriety and there is nothing to suggest that either of the assistant U.S. attorneys would have had a motive for jeopardizing their careers by tampering with the tapes or lying in their affidavits. The assistant U.S. attorneys were aware of their statutory duty and had established a procedure for complying with it. There is no suggestion of a pattern, either in the Office of the U.S. Attorney for the Northern

District of Illinois or in the Justice Department generally, of failure to comply with the requirement of immediate judicial sealing of tapes of Title III intercepts. Indeed, we have found no recent cases in which the Department was found to have tampered with tapes of Title III intercepts.

Relative to the statutory purpose, we conclude, the explanation offered for the lapse was satisfactory, and so the district judge was correct to deny the motion to suppress. There was neglect, but it was harmless and therefore, while it was not justifiable, it was excusable. Cf. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 394-95, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993). But for future reference we note that the government would be in a stronger position if, back in 1997, the assistant U.S. attorneys had memorialized the circumstances giving rise to the delay in the sealing of the tapes.

The only other issue – and it isn't really an *issue* – concerns the sentence. The sentence was imposed before the Supreme Court's decision in the *Booker* case, and the government concedes that in light of that decision the sentence violates the *Sixth Amendment*. Because the district judge indicated that if his hands weren't tied by the federal sentencing guidelines he would have given the defendant a shorter sentence, we remand for resentencing. See *United States v. Paladino,* 401 F.3d 471, 482 (7th Cir. 2005).

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James B. Zagel	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 CR 945-02	**DATE**	11-17-00
CASE TITLE	UNITED STATES OF AMERICA v. CONEY		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due ___.

(3) ☐ Answer brief to motion due ___. Reply to answer brief due ___.

(4) ☐ Ruling/Hearing on ___ set for ___ at ___.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(7) ☐ Trial [set for/re-set for] on ___ at ___.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21
☐ FRCP41(a)(1) ☐ FRCP41(a)(2)

(10) ■ [Other docket entry] The motion is denied.

(11) ■ [For further detail see order on the reverse side of the original minute order.]

	No notices required, advised in open court.		number of notices	Document Number
	No notices required.		NOV 20 2000 date docketed	87
	Notices mailed by judge's staff.	Filed for Docketing Nov. 17, 2000		
	Notified counsel by telephone.		/s/ PP docketing deputy initials	
✓	Docketing to mail notices.			
	Mail AO 450 form.		date mailed notice	
	Copy to judge/ magistrate judge.			
DW	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials	

The defendant Coney seeks suppression of certain intercepted conversations and dismissal of the indictment.

Interception was authorized for 30 days and renewed for another 30. The second 30-day period began on 10 September (the day the order was signed) and ended on 10 October. No further extension was requested until early

November. The sealing order for the second period was not requested until 20 October. Sealing is mandatory upon expiration of an intercept order. The law is clear that when the government does not secure immediate sealing it must establish that the delay was objectively reasonable. The fact that the government proves absence of any tampering is not enough. See United States v. Ojeda Rios, 495 U.S. 257 (1990). Exclusion is the remedy.

The prosecution has an explanation. AUSA Ross was responsible for these overhears, which were part of a larger, long-term investigation, and, at the end of September, she went on a long-planned vacation. She anticipated that AUSA Salovaara would handle any issues that came up during Ross's absence. Salovaara did not realize that the 10 September authorization had expired and that Ross would not be able to prepare a sealing application before 17 October. Ross did prepare the application on 17 October but was unable to file it until the following Monday, the 20th. The delay is five business-days long. The 11th thru the 13th were not business days, nor were the 18th and 19th. The 20th was the fifth business day after the 10th.

There is no contention that there was tampering with the tapes. They were never touched after being sealed in evidence bags. And I have no doubt that the explanation of the delay is an honest one. The only issue is whether the explanation is reasonable. The explanation is essentially that Ross did not communicate the necessity for a sealing order to Salovaara. Mistakes like this are sometimes accepted as satisfactory explanations. See United States v. Pedroni, 958 F.2d 262 (9th Cir. 1992); United States v. Plescia, 48 F.3d 1452 (7th Cir. 1995), United States v. Rodriguez, 786 F.2d 472 (2d Cir. 1986), United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977). And delays much

longer than the five or ten days at stake here have been sanctioned by courts in cases where the sealing delay was caused by mistakes of various sorts.

I find the explanation satisfactory here.

The absence of tampering is irrelevant to the decision of whether the government's explanation is satisfactory, but the presence of tampering would be an independent ground for suppression of evidence. Because it is possible that defendant, during further investigation and during the course of trial, may discover further evidence to believe that there is some reason to raise the possibility of tampering, I deny the motion but do so without prejudice to its being raised again. I would also permit refiling of the motion if facts are discovered which give some reason to doubt the honesty of the proffered explanation (perhaps because of the inconsistency or lack of explanation to the judge who finally ordered sealing).

The motion is denied.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

(Filed Sept. 28, 2000)

I, Jacqueline Ross, being duly sworn, hereby depose and state:

1. I, JACQUELINE ROSS, was employed as an Assistant United States Attorney (AUSA) in the Northern District of Illinois from October 20, 1990 through May 18, 2000. I was one of the attorneys involved in the prosecution of the defendants in 98 CR 562 and 99 CR 945.

2. From approximately 1996 through 1999, I was one of the attorneys assigned to the FBI's investigation of Charles Jackson and his drug associates.

3. I was responsible for, *inter alia,* obtaining a September 10, 1997 Interception Order entered by Chief Judge Marvin Aspen. This September 10, 1997 Order was set to expire on October 10, 1997.

4. From on or about September 30, 1997 through October 16, 1997, I was out of the office on previously scheduled vacation. Prior to my departure, I had arranged with my supervisor, AUSA Mark Prosperi, my partner on the case, Kaarina Salovaara and the Case Agent, FBI Special Agent Randall McIntosh, for them to handle any and all issues relating to the Jackson investigation and the previously mentioned September 10, 1997 Interception Order.

5. When I returned to the office, on October 17, 1997, I learned that the September 10, 1997 Interception Order had expired on October 10, 1997 and the resulting tape-recordings had not yet been sealed under 18 U.S.C. § 2518(8)(a).

6. After learning that the tapes had not been sealed, I consulted with my supervisor and immediately began preparing the necessary sealing application and order. I completed the sealing application and order on October 17, 1997. To the best of my recollection, however, it was not possible to bring the tapes to Chief Judge Aspen that same day for reasons having to do either with the schedules of Chief Judge Aspen or the Case Agent Randall McIntosh. Consequently, I was unable to file the sealing application and order on October 17, 1999.

7. First thing in the morning, on October 20, 1997, I filed the sealing application and order with Chief Judge Aspen's chambers and the sealing order was entered later that same day.

8. To the best of my knowledge and belief, there has been no tampering or adulteration of the tape-recordings from the September 10, 1997 Interception Order. Moreover, the delay in sealing these tapes was not the result of bad faith on my part or a deliberate disregard of the applicable statute.

FURTHER AFFIANT SAYETH NOT.

/s/ Jacqueline Ross
JACQUELINE ROSS

Subscribed and sworn to before me
this 17th day of July, 2000.

/s/ [illegible] Margaret R. Cusack
NOTARY PUBLIC

"OFFICIAL SEAL"
MARGARET R. CUSACK
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 4/23/2002

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT

I, Kaarina Salovaara, being duly sworn, hereby depose and state:

1. I am an Assistant United States Attorney in the Northern District of Illinois, and I have been an assistant since March 1991. In preparing this affidavit, I have reviewed the affidavit prepared by Jacqueline Ross, dated July 17, 2000, and various other materials in an effort to refresh my recollection about certain events.

2. In 1997, I was assigned to work with then-Assistant United States Attorney Jacqueline Ross on an investigation of Charles Jackson and various other individuals who were alleged to be involved in drug trafficking. The FBI was the law enforcement agency leading the investigation. At the time I was assigned to the investigation, Ms. Ross had applied for, and received, an order authorizing the interception of electronic communications

on at least one telephone used by Charles Jackson. That order was due to expire on or about Friday, October 10, 1997.

3. To the best of my recollection, sometime in late September 1997, Ms. Ross left the office for a vacation of several weeks. While she was out of the office, I worked with various FBI agents, including case agent Randall McIntosh, on issues relating to the ongoing investigation. For example, with agent McIntosh's assistance, on Thursday, October 2 and Thursday, October 16, respectively, I prepared and filed with Chief Judge Aspen interim report #5 and interim report #6, respectively, concerning the electronic interceptions.

4. The interception order obtained by Ms. Ross expired on Friday, October 10, 1997. The following Monday, October 13, 1997, was a federal holiday, and the federal courts were closed. For reasons I am not able to reconstruct, the government did not move to seal the tapes with Chief Judge Aspen for an additional three days, until Friday, October 17, 1997. It is possible, but I can not say for certain, that I understood that Ms. Ross was returning to the office early in the week of October 13. As set forth in her affidavit, on Friday, October 17, Ms. Ross prepared the sealing application and draft order and the application was dated Friday, October 17, 1997. However, she was unable to file the application and draft order that day, and they ultimately were filed with Chief Judge Aspen on Monday, October 20, 1997.

5. To the best of my knowledge and belief, there has been no tampering or adulteration of the recordings made pursuant to the September 10, 1997 interception order. In addition, the five business-day delay in sealing these tapes

was not the result of bad faith or a deliberate disregard of the applicable statute.

/s/ Kaarina Salovaara
Kaarina Salovaara

Subscribed and sworn to before me
this day of September 2000.

/s/ Peggy M. Zabinski
Notary Public

"OFFICIAL SEAL"
PEGGY M. ZABINSKI
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6/4/2002

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No. 05-181

In the Supreme Court of the United States

WILLIAM CONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review and legal principles in holding that the government had provided a satisfactory explanation under 18 U.S.C. 2518(8)(a) for its delay in sealing wiretap tapes.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 407 F.3d 871. The order of the district court denying petitioner's motion to suppress (Pet. App. 8-11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2005. The petition for a writ of certiorari was filed on August 4, 2005. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois on one count of conspiracy to possess with

intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 846, and three counts of unlawful use of a telephone while conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. 843(b). He was sentenced to 240 months of imprisonment, to be followed by a five-year term of supervised release. Gov't C.A. Br. 1-3. The court of appeals affirmed the conviction, but remanded for resentencing. Pet. App. 7.

1. In August 1996, Federal Bureau of Investigation (FBI) agents began investigating a drug organization in the Englewood area of Chicago, Illinois. The investigation focused on a drug dealer named Charles Jackson and his associates. An informant made eight controlled undercover purchases from Jackson. The purchases were documented by surveillance photos, and in some cases, videos. Gov't C.A. Br. 3-4.

As part of the investigation, then-Chief Judge Marvin E. Aspen of the United States District Court for the Northern District of Illinois authorized, pursuant to 18 U.S.C. 2518, the interception of wire communications to and from Jackson's cellular telephone and pager and communications to and from the phone of Robert Allen, one of Jackson's suppliers. Gov't C.A. Br. 4-5; Pet. App. 12-13. Chief Judge Aspen issued three separate surveillance orders. The first ran from August 8, 1997, through September 7, 1997. The tapes from this wiretap were immediately submitted to and sealed by the district court. The second order authorized an extension of the surveillance of the same cellular phone from September 10, 1997, through October 10, 1997. The government submitted the tapes from this wiretap to the chief judge for sealing on October 20, 1997. Gov't C.A. Br. 16-17.

The wiretap tapes included at least nine calls in which petitioner participated in conversations relating

to narcotics transactions with Jackson or Allen. Gov't C.A. Br. 3-5.

2. On January 26, 2000, a federal grand jury charged petitioner with one count of conspiring to possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. 846, and three counts of unlawful use of a telephone in the commission of a conspiracy to possess and distribute mixtures containing cocaine in violation of 21 U.S.C. 843(b). On June 26, 2001, the grand jury returned a superseding indictment charging the same offenses. Gov't C.A. Br. 2-3.

On June 27, 2000, petitioner filed a motion to suppress the communications intercepted during the second wiretap. Petitioner argued that the tapes from the wiretap had not been sealed "[i]mmediately," and the government had not provided a "satisfactory explanation" for the delay in submitting the tapes for sealing as required by 18 U.S.C. 2518(8)(a). In response to petitioner's motion, the government submitted affidavits from the two prosecutors coordinating the investigation, Jacqueline Ross and Kaarina Salovaara. Pet. App. 12-16. Ross and Salovaara stated that the delay in sealing the tapes was the result of a miscommunication about the handling of responsibilities during Ross's vacation and the date on which Ross was returning to the office. When Ross returned from vacation on Friday, October 17, 1997, she learned that the tapes had not yet been sealed, and she immediately prepared the necessary sealing application and order. She was unable, however, to file the papers until Monday, October 20, 1997, because of the unavailability of either Chief Judge Aspen or the FBI case agent. *Ibid.*

On November 17, 2000, the district court denied petitioner's motion to suppress the communications. The

court found that the government's explanation for the delay was that there had been a mistake; that such a mistake can be "accepted as [a] satisfactory explanation[]"; that the explanation was an "honest one"; and that the delay was shorter than that excused by other courts. Pet. App. 8-11.

3. The court of appeals affirmed. Pet. App. 1-7. The court first held that the ten-day delay in submitting the tapes was too long for the sealing to be considered "immediate." *Id.* at 3. The question, then, was whether the government's explanation for the delay was satisfactory.

The court held that a district court's determination that an explanation in the particular context is "satisfactory" is closely tied to factual, not legal, determinations, and thus should receive deferential review. Pet. App. 3-4. Under such review, the court of appeals held that an explanation is satisfactory if, "in the circumstances, it dispels any reasonable suspicion of tampering." *Id.* at 6. Whether it does so depends on a number of factors, the court explained, including the plausibility of the explanation, the length of the delay, the nature of the crime and the notoriety of the defendant, and the importance of the tapes to the government's case. *Ibid.*

In this case, the court of appeals held that because the delay was relatively short, the prosecutors' explanations were plausible, the case was a routine drug prosecution of a defendant of no particular notoriety, the prosecutors had no special motive to tamper with the tapes or lie in their affidavits, and there was no suggestion of a pattern in the Office of the United States Attorney for the Northern District of Illinois, or the Justice Department generally, of failure to comply with the requirements of Section 2518(8)(a), the explanation was satisfactory. Pet. App. 6-7.

ARGUMENT

Petitioner contends (Pet. 5-7) that this Court should grant review because the court of appeals' decision conflicts with the rulings of four other courts of appeals and contravenes this Court's decision in *United States* v. *Ojeda Rios*, 495 U.S. 257 (1990). That claim lacks merit, and further review is not warranted.

1. Except under extraordinary circumstances, see 18 U.S.C. 2518(7), electronic surveillance may be conducted only pursuant to a court order. See also 18 U.S.C. 2518(1)-(6). Section 2518(8)(a) requires that "[t]he contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device" and that recording "shall be done in such a way as will protect the recording from editing or other alterations." The section further provides that "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions."

Section 2518(8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517." See *Ojeda Rios*, 495 U.S. at 259-260. Accordingly, unless wiretap tapes are sealed immediately or the government provides a satisfactory explanation for the delay in obtaining a seal, the tapes are inadmissible.

Petitioner asserts that there is a conflict among courts of appeals over the level of deference due a district court's determination that the government has proffered a "satisfactory explanation" for delay in sealing the tapes, within the meaning of 18 U.S.C. 2518(8)(a). Petitioner claims that the majority of circuits decide *de novo* whether the government's explanation is satisfactory, while only the Sixth and the Seventh Circuits view satisfactoriness as a factual determination to be reviewed for clear error. Pet. 5-6.

Although the Seventh Circuit perceived a conflict on this issue, see Pet. App. 3, any formal disagreement over the standard of review does not appear to have practical significance in either methodology or outcomes. Notwithstanding the statements by the Seventh and Sixth Circuits that satisfactoriness is a factual question, both circuits, in practice, have closely tracked the majority position, which is to defer to the evidentiary findings of the district court and then to arrive at an independent conclusion regarding whether the explanation was satisfactory within the meaning of Section 2518(8)(a).

The court of appeals in this case reasoned that, since "[t]he question what is a 'satisfactory explanation' is fact-specific * * * rather than being governable by a rule that an appellate court might lay down," deference should be given to the district court's ultimate determination. Pet. App. 3. But before according such deference, the court engaged in a detailed analysis of the term "satisfactory" under Section 2518(8)(a), holding that "an explanation is satisfactory if, in the circumstances, it dispels any reasonable suspicion of tampering." *Id.* at 6. The court went on to specify particular factors that might aid in making this determination, such as the believability of the explanation (which it

deemed "critical"), the plausibility of the explanation, the length of delay, the nature of the crime (including its notoriety or the notoriety of the defendant), the pressure on the government to obtain a conviction, and the importance of the tapes to the government's case. *Ibid.* The court then applied this detailed legal standard to the uncontested facts of the delay in this case, and agreed with the district court that the government's explanation was satisfactory.

This approach is not meaningfully different from that taken by the courts of appeals for the Second, Eighth, Ninth, and Tenth Circuits or, for that matter, the Sixth Circuit, where the courts have deferred to the factual findings of the district court but conducted their own examination whether, in light of those facts, the government's explanation was satisfactory, taking into consideration such factors as the length of the delay, the credibility of the government's reasons, and the likelihood of gamesmanship. See, *e.g.*, *United States* v. *Cline*, 349 F.3d 1276, 1284-1285 (10th Cir. 2003); *United States* v. *Wilkinson*, 53 F.3d 757, 760 (6th Cir. 1995); *United States* v. *Pedroni*, 958 F.2d 262, 265-266 (9th Cir. 1992); *United States* v. *Sawyers*, 963 F.2d 157, 159-161 (8th Cir.), cert. denied, 506 U.S. 1006 (1992); *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 951 (2d Cir. 1990), cert. denied, 501 U.S. 1211 (1991).

In any event, even assuming that the courts of appeals apply varying standards of review, this case does not present an appropriate vehicle for addressing the issue. Under any standard of review, the delay here was excusable. See *Ojeda Rios*, 495 U.S. at 265 (holding that the satisfactory explanation standard requires the government to explain why delay was excusable). The delay was short, there was no reason to believe it was tactical,

and there was no suggestion of tampering. See *Cline*, 349 F.3d at 1284 ("there [was] no evidence of bad faith and no indication that the recordings were tampered with or that there was any tactical advantage gained by" a one-week delay); *Wilkinson*, 53 F.3d at 760 (where there was no basis for inferring any prejudice to defendant, no evidence of tampering, and no indication that 15-day delay in sealing tape was either a deliberate flouting of the statutory requirement or an effort to gain tactical advantage, explanation was satisfactory); *Maldonado-Rivera*, 922 F.2d at 950 ("In general, explanations have been ruled satisfactory where the government advanced a bona fide reason, there was no reason to believe there was any deliberate flouting of the Title III requirements, no reason to doubt the tapes' integrity, and no basis for inferring any other prejudice to the defendants.").

There is also no indication that the standard of review has any significant bearing on the outcome of the decided cases. See *Pedroni*, 958 F.2d at 265 (explanation was satisfactory where "(1) integrity of the tapes maintained through special procedures; (2) total delay of only fourteen days; (3) tapes were ready for sealing in six days (and in three non-holiday work days); (4) delay due to heavy work load of responsible FBI agent; (5) part of delay due to judge's unavailability and decision when to schedule hearing"); *United States* v. *Maxwell*, 25 F.3d 1389, 1394 (8th Cir.) ("Intervening weekends, holidays, and the unavailability of the issuing judge are satisfactory explanations for slight delays in presenting wiretap recordings for sealing."), cert. denied, 513 U.S. 1031 (1994); *United States* v. *Ardito*, 782 F.2d 358, 362-363 (2d Cir.) (two-day intervening holiday, unavailability of issuing judge, and need to prepare paperwork provided

adequate explanation for five-day delay), cert. denied, 476 U.S. 1160 (1986). In the absence of indications that the different articulations of the standard of review are producing different results, this Court's review is not warranted.

2. Petitioner also argues (Pet. 7) that the court of appeals' decision conflicts with this Court's ruling in *Ojeda Rios* by permitting proof that tampering has not occurred to substitute for a satisfactory explanation for a delay in sealing. This argument, too, lacks merit.

This Court, in *Ojeda Rios*, held that the "'satisfactory explanation' language in § 2518(8)(a) must be understood to require that the Government explain not only why a delay occurred but also why it is excusable." 495 U.S. at 265. The court of appeals here applied that standard, considering carefully the government's explanation before excusing the delay. Pet. App. 7.

The court of appeals' analysis does not conflict with this Court's statement in *Ojeda Rios* that "proof of nontampering" is not a "substitute for a satisfactory explanation." 495 U.S. at 264-265. *Ojeda Rios* did not suggest that nontampering is irrelevant to the analysis. Indeed, this Court was clear that the central function of the sealing requirement is to guard against tampering, stating:

> The primary thrust of § 2518(8)(a) and a congressional purpose embodied in Title III in general, is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance. The presence or absence of a seal does not in itself establish the integrity of electronic surveillance tapes. Rather, the seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations

> that have been recorded. It is clear to us that Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings.

Id. at 263 (citations omitted) (citing S. Rep. No. 1097, 90th Cong., 2d Sess. 105 (1968)). Nevertheless, *Ojeda Rios* made clear that non-tampering is not sufficient to satisfy Section 2518(8)(a)'s "satisfactory explanation" requirement, and that the government must also establish "good cause for the sealing delays." *Id.* at 265-266.

The court of appeals did not equate proof that tampering did not occur with proof of a satisfactory explanation. In observing that "an explanation is satisfactory if, in the circumstances, it dispels any reasonable suspicion of tampering," Pet. App. 6, the court of appeals was explaining why it had rejected petitioner's argument that an explanation that "reveals that the delay was the result of carelessness" is per se inadequate. *Id.* at 5. The court found such a "strict" rule to be excessive in light of the purpose of the statute, which is to minimize the risk of tampering. *Id.* at 5-6.

But the court went on to make clear that the government's overall conduct had to be evaluated in order to determine whether its explanation was satisfactory, and nowhere suggested that proof of nontampering alone would satisfy the government's burden or substitute for a satisfactory explanation. Thus, the court held that whether an explanation is satisfactory depends on several factors, including the plausibility of the explanation, the length of the delay, the nature of the crime and the notoriety of the defendant, and the importance of the tapes to the government's case. Pet. App. 6. The court of appeals' approach, therefore, does not conflict with *Ojeda Rios*, in which this Court examined whether the

delays at issue "were the result of a good-faith, objectively reasonable misunderstanding." 495 U.S. at 265.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

VIJAY SHANKER
Attorney

OCTOBER 2005